79135-0

NO. 20927-0-III

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

RESPONDENT,

V.

OCTAVIO GONZALES FLORES

APPELLANT.

STATE'S MOTION ON THE MERTS

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1. IDENTITY OF MOVING PARTY

The moving party is the State of Washington, represented by Karl F. Sloan, Okanogan County Prosecuting Attorney.

2. RELIEF SOUGHT

The State of Washington moves the Washington State Court of Appeals, Division III to affirm the decision of the trial court finding that the defendant was guilty of six counts of delivery of a controlled substance – cocaine; one count of possession of a controlled substance with intent to deliver – cocaine; and two counts of involving a minor in a drug transaction, and uphold the trial courts imposition of an exceptional sentence.

3. FACTS RELEVANT TO MOTION

The defendant was charged with unlawful delivery of a controlled substance, RCW 69.503401(a)(1)(i), in counts I, III, V, VI, VII, and VIII, for incidents occurring on July 26, 2001, July 31, August 3, August 14, August 24, and September 25. The defendant was also charged with involving a minor in drug dealing, RCW 69.50.401(f), in counts II and IV, for incidents occurring on July 26, 2001 and July 31; and unlawful possession of a controlled substance

with intent to deliver, RCW 69.50.401(a)(1)(i), in count IX, for an incident occurring on September 25, 2001. CP 12-16.

The transactions were controlled buys, using a confidential informant working under the direction of the North Central Washington Narcotics Task Force. RP 71; 97; 104; 117-118; 133-135; 154-155; 209; 219; 227; 445-448. The confidential informant was Lorin Hutton. RP 88.

When Mr. Hutton began working with the Task Force, he identified the defendant and his wife, Sandra (Flores), as individuals he could purchase cocaine from. RP 95. Although Mr. Hutton did not speak Spanish, he did understand some basic words in Spanish. RP 452.

The transactions in counts III, IV, V, VI, VII, VIII, were monitored and recorded using body wires placed on the informant. Additionally, the transactions in count VIII were video recorded using aerial surveillance, and a video camera on the informant's vehicle. RP 238-239.

In count I, July 26, Mr. Hutton purchased cocaine from Sandra Flores and the defendant at their residence. Sandra Flores

acted as a translator between Mr. Hutton and the defendant throughout the transactions. RP 107; 450. Also present during the transaction was the defendant's minor stepdaughter, Jessica Chapa. RP 108-109; 203; 451. The transaction was for six bindles of cocaine with a gross weight of 2.5 grams for $150. RP 104-105.

Mr. Hutton testified the child was present and, he believed, understood what was occurring. RP 451;491-492. Mr. Hutton testified he made contact with Sandra Flores, who was sitting next to her daughter, outside of their residence. RP 491-492. Sandra translated Mr. Hutton's request to the defendant, who came over to Sandra and the child, where he conducted the transaction. RP 491-492. Mr. Hutton testified that during the transaction, Sandra Flores was conversing with the child. RP 482-483.

In count III, July 31, Mr. Hutton purchased cocaine from Sandra Flores and the defendant inside their residence. Again, the defendant's minor stepdaughter was present. RP 123-124; 203-204. Mr. Hutton entered the small cabin directly into the living room, where the child was. The defendant was in the kitchen area that

adjoined, and was open to, the living room. RP 454-456; 485-486; 492-495.

Sandra Flores and the defendant, conversed with the child during the transaction. RP 486. Mr. Hutton indicated the child was on the couch in the living area of the cabin where the transaction was made and that no effort was made by the defendant or Sandra Flores to conduct the transaction outside of her presence. RP 454-456. The transaction was for five bindles of cocaine with a gross weight of 4.6 grams for $300. RP 123.

Detective Jan Lewis monitored the body wire and was able to hear Mr. Hutton referring to Octavio when discussing with Sandra a future transaction. RP 274-277.

In count V, August 3, Mr. Hutton purchased cocaine from Sandra Flores and the defendant at their residence. RP 135; 204-205. The transaction was for fifteen bindles of cocaine with a gross weight of 7.3 grams for $400. RP 135; 204.

On August 10, Mr. Hutton identified the defendant and Sandra Flores from separate photo montages. RP 141-147. Also on August 10, Mr. Hutton conducted a transaction with the

defendant's brother, Arnulfo Flores, at the defendant's residence. RP 465-466. Mr. Hutton testified he could differentiate Arnulfo from Octavio. RP 466; 470; 471; 479; 498; 504. The transaction was for cocaine with a gross weight of 18.9 grams for $850. RP 150.

In count VI, August 14, Mr. Hutton purchased cocaine from Sandra Flores and the defendant at their residence. RP 158; 208-209. Detective Brown monitored the body wire, and was able to hear the informant ask for $500, and a female voice tell the informant "You have to wait a minute. He is in the shower." RP 211. The transaction was for cocaine with a gross weight of 8 grams for $500. RP 158.

In count VII, August 24, Mr. Hutton purchased cocaine from Sandra Flores and the defendant at their residence. RP 158; 208-209. The transaction also involved the defendant's brother, Arnulfo Flores. RP 219; 228-229. The transaction was for cocaine with a gross weight of 12.5 grams for $850.

On September 12, Mr. Hutton was directed to make contact with the defendant and Sandra Flores to arrange a specific date to purchase a large amount of cocaine. The purpose of arranging the

transaction was to allow the Task Force to utilize aerial surveillance. RP 231-235.

In count VIII, September 25, Mr. Hutton purchased cocaine from the defendant in the orchard near his residence. RP 158; 208-209; 474-480. The transaction consisted of two separate deliveries. After the defendant delivered the first amount of cocaine directly to Mr. Hutton, Mr. Hutton asked the defendant for another quantity of cocaine. RP 244-245; 476-477. The defendant left and later returned with additional cocaine that was handed to Mr. Hutton by the passenger in the defendant's vehicle. RP 477. The total gross weight of both cocaine transactions was 25.5 grams for a total of $1,425. RP 242; 247.

Mr. Hutton testified that he believed the defendant was making the decisions about the cocaine dealing. RP 473. Mr. Hutton also described an incident where Sandra told Mr. Hutton that when he had previously purchased cocaine from Arnulfo (August 10) for $850, that was the wrong price. The price should have been $900. RP 468.

Law enforcement executed a search warrant on the defendant's residence on September 25 and arrested Sandra Flores. RP 247-249. Sandra Flores gave a statement that included information about a transaction she had conducted that day; the drug operations she, the defendant, and Arnulfo Flores had conducted; and that her daughter was present during some of the transactions. RP 253-254.

The defendant was placed under arrest on September 25 and found to be in possession of cocaine and recorded money that the Task Force had given to the informant earlier that day. RP 368-371.

The defendant testified he was married to Sandra Flores and that he lived at the Waddell Orchard cabin during the time period of the transactions with his wife and his 13 year old stepdaughter. RP 653-654. The defendant stated he did not work at Waddell Orchard at the time, but paid rent to live there. RP 657.

The defendant initially testified he only saw Mr. Hutton one time on September 25, when Mr. Hutton came to another orchard where the defendant was working. RP 661-662. The defendant then testified he saw Mr. Hutton near the river when he gave Uveldo

a ride and Uveldo delivered to Mr. Hutton. RP 664-665. The defendant then testified Mr. Hutton had come by his house on prior occasions. RP 666.

When asked about the body wire recordings, the defendant admitted that his voice could be heard on the tapes. RP 714.

4. GROUNDS FOR RELIEF AND ARGUMENT

RAP 18.14(e) states as follows:

> (1) Motion to affirm. A Motion on the Merits to affirm will be granted in whole or in part if the appeal or any part thereof is determined to be clearly without merit. In making these determinations, the judge or commissioner will consider all relevant factors including whether the issues on review (a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly was in the discretion of the trial court or administrative agency.

A. The Standard of Proof for Involving a Minor in Drug Dealing Is Clearly Controlled by the Plain Language of RCW 69.50.401(f) and State v. Hollis

State v. Hollis, 93 Wn.App. 804, 970 P.2d 813 (1999); review denied, *State v. Hollis*, 137 Wn.2d 1038, 980 P.2d 1285, (1999); *State v. Reddick*, 137 Wn.2d 1037, 980 P.2d 1286 (1999), is controlling in the instance case, where the defendant's act of

allowing a minor child to be present during deliveries of cocaine violated RCW 69.50.401(f).

The plain language of RCW 69.50.401(f) does not require that the minor actually participate in the drug transaction. The defendant's act of allowing a minor to remain present during the drug transaction violates the statute. *Hollis* at 812.

Defendant's argument that *Hollis* was erroneously decided is without merit. The defendant erroneously argues that the participation of the minor child is relevant to the crime, and that the standard of proof for the crime is analogous to that of accomplice liability or constructive possession.

This attempt to link culpability for the crime to the minor's actions is precisely the argument that the court in *State v. Hollis* rejected. The court in *Hollis* stated:

> The involving a minor in a drug transaction statute does not require that the minor actually participate in the drug transaction. In fact, the minor's culpability and actions which are proscribed under other statutes are inapposite for the purposes of the involving a minor in a drug transaction statute. Instead, the focus is on the defendant's affirmative acts. A defendant violates RCW 69.50.401(f) if he or she compensates, threatens, solicits or in any other manner involves i.e., surrounds, encloses, or draws in a minor in an unlawful drug transaction, or obliges a minor to become associated with the drug transaction, e.g., by inviting or

> bringing a minor to a drug transaction, or allowing the minor to remain during a drug transaction.

Hollis at 812. Under the statute, the defendant's act of involving a minor in a drug transaction is what is criminalized. Hollis held that under the statute, the term "involve" was to be given its ordinary meaning, because it was not defined in the statue. *Hollis* at 811.

Thus, the plain language of the statute "*in any other manner involve*" includes acts of inviting or bringing a minor to a drug transaction, or allowing the minor to remain during a drug transaction. *Hollis* at 811-812.

In the present case, the defendant not only brought the transactions into the minor child's home, but he conducted them in her presence. To argue these acts of the defendant did not involve the child is contrary to clearly settled law.

B. The Defendant's Introduction of Evidence Following the Trial Courts Denial of His Motion to Dismiss Waived his Right to Challenge the Sufficiency of the Evidence at the Close of the State's Case

In the present case, the defendant moved to dismiss Counts II and IV at the conclusion of the State's case in chief. The trial court reserved its decision on the motion to dismiss. The court ruled on

the motion to dismiss after the defendant had called his first witness, Arnulfo Flores, but before the defendant testified.

Defendant now argues that "*Since no additional testimony was presented concerning Jessica's involvement...*" the court of appeals should review his challenge for sufficiency of the evidence as of the time the State rested. *See Appellant's brief, pg 13.*

The defendant's position is in opposition to the case law concerning challenges to the sufficiency of the evidence.

A defendant waives a challenge to the sufficiency of the evidence at the close of the State's case if he introduces evidence on his behalf, unless the evidence has no bearing on the merits of the case. *E.g., State v. Young*, 50 Wn. App. 107, 111 (1987). A defendant can, however, always seek appellate review of the sufficiency of the evidence *as a whole* to support a criminal conviction. *Id.* (*emphasis added*).

The defendant's argument may have had merit if the defendant had not introduced additional evidence after the trial court denied his motion to dismiss. However, after the court's denial, the

defendant chose to testify, and that testimony clearly had bearing on the merits of the case.

Accordingly, the defendant waived his challenge to the sufficiency of the evidence at the close of the State's case. Therefore, the reviewing court must look at the evidence as a whole to determine if the evidence supports the defendant's challenge on the sufficiency to the evidence.

C. The Facts Presented at Trial for Counts II and IV were Sufficient for a Rational Trier of Fact to Find the Defendant Guilty

When a defendant raises the issue of sufficiency of the evidence, the court must determine whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *E.g., State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the state and interpreted most strongly against the defendant. *E.g., State v. Salinas*, 119 Wn.2d 192, 201, 829 P2d 1068 (1992).

The reviewing court is not required to determine whether the evidence at trial established guilt beyond a reasonable doubt. *Green*, 94 Wn.2d at 221.

Whether there is evidence legally sufficient to go to the jury is a question of law for the courts; but, when there is substantial evidence, and when that evidence is conflicting or is of such a character that reasonable minds may differ, it is the function and province of the jury to weigh the evidence, to determine the credibility of the witnesses, and to decide the disputed questions of fact. *State v. Hagler*, 74 Wn.App. 232, 235, 872 P.2d 85 (1994), (citing *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980).

Thus, a claim of insufficiency of the evidence admits the truth of the state's evidence and all inferences that reasonably can be drawn from it. *Theroff*, 25 Wn.App. at 593.

RCW 69.50.401(f) proscribes conduct that involves a minor in an illegal drug transaction. This statute includes any affirmative act by the defendant that surrounds, encloses, or draws in a minor in an unlawful drug transaction, or obliges a minor to become associated

with a drug transaction, e.g., by inviting or bringing a minor to a drug transaction, or allowing the minor to remain present during a drug transaction. *Hollis* at 815.

In *Hollis* the court analyzed the sufficiency of the evidence for charges brought against defendant *Reddick* pursuant to RCW 69.50.401(f).

In the case of *Reddick*, the court found that by bringing the minor to the drug transaction and allowing her to remain, *Reddick* obliged the minor to become associated with the drug transaction. *Reddick's* affirmative acts were sufficient to permit a rational trier of fact to find beyond a reasonable doubt that *Reddick* involved the minor in a drug transaction, notwithstanding the minor's participation or lack thereof in the delivery. *Hollis* at 816.

In the present case, the defendant conducted drug sales at, or in, the residence he shared with the minor child. On two of the seven controlled drug transactions, the minor child was present. The defendant's choice to conduct the drug transactions at the minor child's residence while she was present forced the child to be

involved in the transaction, irregardless of her participation or desire to remain.

D. The Exceptional Sentence Imposed was a Matter of Judicial Discretion and was Reasonable where Aggravating Circumstances Existed

Appellant argues that the trial court erred by imposing an exceptional sentence pursuant to RCW 9.94A.535(2). However, the defendant's case satisfied all of the criteria for a major violation of the Uniform Controlled Substances Acts warranting an exceptional sentence. RCW 9.94A.535(2)(e) states:

> The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:
>
> (i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;
> (ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;
> (iii) The current offense involved the manufacture of controlled substances for use by other parties;
> (iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

> (v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement.

Under the Sentencing Reform Act of 1981, a trial court must impose a sentence within the standard range unless it finds substantial and compelling reasons to justify a departure. In determining whether an exceptional sentence upward should be upheld, we consider whether (1) the reasons given by the trial court to justify the exceptional sentence are supported by the record; (2) those reasons justify a departure from the standard range as a matter of law; and (3) the sentence imposed is clearly excessive. E.g., *State v. Overvold*, 64 Wn. App. 440, 444, 825 P.2d 729 (1992).

The exceptional sentence imposed herein was a matter of judicial discretion. The defendant has the burden of showing that the sentence was "clearly unreasonable, i.e., exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken." *State v. Strong*, 23 Wn.App. 789, 794, 599 P.2d 20 (1979).

The trial court set out in its findings of fact and conclusions of law a summary of the information supporting the exceptional sentence. This included the fact that the defendant led an operation responsible for selling 1.5 to 3 ounces (42 to 84 grams) per day. CP 125-127. Even where the court treated counts II and IV as the same criminal conduct as the delivery counts, the defendant's offender score still totaled 18, or twice the top end of the scoring range. CP 114-124.

Pursuant to RAP 18.14(e)(1), the court should grant the State's motion on the merits and affirm the exceptional sentence.

E. Statements Made by Sandra Flores Were Properly Admitted

The trial court properly admitted the statements made by the defendant's wife, Sandra Flores, pursuant to ER 801(d)(2) – Admissions by Party Opponent, ER 803(a)(1) – Present Sense Impression, and ER 804(b)(3) – Statements Against Interest.

1. The statements made to the informant were admissible under ER 801(d)(2)

The statements made by Sandra Flores to the informant were admissible under ER 801(d)(2). Statements meeting the requirements of ER 801(d) are not hearsay. ER 801(d)(2) states:

> Admission by party-opponent. The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy

A statement admitted under ER 801 does not require that the statement be "against interest" when made. *Karl B. Tegland, Washington Practice: Courtroom Handbook on Washington Evidence*, at 361 (2004). The rule applies to both oral and written statements. *Tegland* at 366.

ER 801(d)(2)(v) does not restrict its application to criminal cases in which conspiracy has been charged. Even prior to the rule, the availability of the coconspirator exception did not depend on whether a criminal conspiracy was charged. *State v. Dictado*, 102 Wn.2d 277, 283, 687 P.2d 172 (1984). Coconspirator statements

are generally considered sufficiently reliable to withstand confrontation clause scrutiny even without corroboration. *State v. St. Pierre*, 111 Wn.2d 105, 118, 759 P.2d 383 (1988).

However, the statements made by Sandra Flores to Mr. Hutton during the drug transactions *were* corroborated and were properly admitted under ER 801(d)(2). The court found the statements were made in the furtherance of a conspiracy to deliver controlled substances. RP 167-175.

Additionally, the statements made during the transaction for controlled substances, relating to what was actually occurring, would be admissible under ER 803(a)(1) as present sense impression.

2. The statements made to police and at the forfeiture hearing were admissible under ER 804(b)(3)

Contrary to defendant's contention, the trial court did not admit the statements of Sandra Flores at the time of her arrest or at the forfeiture hearing under ER 801(d)(2). The statements were admitted under ER 804(b)(3) after the court analyzed the statements under the Ryan guidelines. RP 184-187.

Statements against interest are not excluded by the hearsay rule if the declarant is unavailable as a witness. ER 804(b)(3) states:

> Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Unavailability as a witness includes situations in which the declarant is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement. ER 804(a)(1). In the present case the defendant invoked his privilege to prevent his wife, Sandra Flores, from testifying. See *RCW 5.60.060*. Therefore, she was unavailable for the purposes of ER 804(b)(3).

The privilege does not bar a third person who heard the spouse's out of court statement from testifying about the statement in court. *State v. Burden*, 120 Wn.2d 371,841 P.2d 758 (1992); *State v. Crawford*, 147 Wn.2d 424, 54 P.3d 656 (2002).

In the present case, the statements made by Sandra Flores at the time of her arrest and at the subsequent forfeiture hearing were clearly against her pecuniary or proprietary interest, subjected her to criminal liability, and rendered invalid her claim on seized property.

In a criminal case, statements against interest are not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. Trustworthiness is determined by reference to the Ryan guidelines. *Karl B. Tegland, Washington Practice: Courtroom Handbook on Washington Evidence*, at 418 (2004). The factors to be considered in determining the reliability or trustworthiness of out-of-court declarations are:

> (1) whether the declarant had an apparent motive to lie; (2) whether the general character of the declarant suggests trustworthiness; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; and (5) whether the timing of the statements and the relationship between the declarant and the witness suggest trustworthiness. Factors to be considered in conjunction with those above are: (1) whether the statements contained express assertions of past fact; (2) whether cross examination could not help to show the declarant's lack of knowledge; (3) whether the possibility of the declarant's recollection being faulty is remote; and (4) whether the circumstances surrounding the statements give no reason to suppose that the declarant misrepresented the defendant's involvement.

E.g., State v. Jordan, 106 Wn. App. 291, 302, 23 P.3d 1100 (2001). Not all the Ryan guidelines need to be satisfied as long as the indicia of reliability is established. *See State v. Anderson*, 107 Wn.2d 745, 753, 733 P.2d 517 (1987).

The trial court's factual determination of whether a statement falls within an exception to the hearsay rule will not be disturbed absent an abuse of discretion. *State v. Strauss*, 119 Wn.2d 401, 417, 832 P.2d 78 (1992).

In the present case the trial court found the statements of Sandra Flores were reliable after analyzing them under the *Ryan* guidelines. The statements were properly admitted.

Pursuant to RAP 18.14(e)(1), the court should grant the State's motion on the merits and affirm the decision to admit the statements.

F. Failure to Object to Complained of Errors Waived Statements

Defendant now raises objection to admission of certain testimony that was not objected to at trial. Arguments not raised in the trial court generally will not be considered on appeal. *E.g.,*

State v. Riley, 121 Wn.2d 22, 31 (1993). Moreover, the errors complained of are not of Constitutional magnitude.

The admission and exclusion of relevant evidence is within the sound discretion of the trial court. The trial court's decision will not be reversed absent a finding of manifest abuse of discretion. See *State v. Swan*, 114 Wn.2d 613, 658 (1990).

Defendant's primary complaint is that evidence about the involvement of his family members in cocaine sales (uncovered during the investigation) should have been limited to those transactions where the defendant admits his involvement.

Even if the defendant had objected at trial, the evidence showing involvement of the defendant's family members was clearly admissible. The evidence was necessary to show the credibility of the informant, i.e. show he could differentiate between the various transactions and the identities of the individuals involved.

Additionally, the evidence was admissible under ER 404(b), where a common scheme or plan existed, and various acts of misconduct were all part of an overall plan or conspiracy. See *State v. Bowen*, 48 Wn. App, 187, 192-93, 738 P.2d 316 (1987).

Here the court found the existence of a conspiracy when analyzing the admissibility of Sandra Flores' statements to the informant. Any error would have been harmless.

The other complained of errors are similarly unsupporrted. For example, the defendant alleges there was a lack of foundation about the defendant's voice to admit the tapes. The tapes would have been admissible solely on the basis that they contained either the informant's voice or Sandra Flores' voice. Moreover, the defendant admitted in re-direct that his voice was on all or part of the body wire tapes. Any error was harmless.

Additionally defendant claims that the statement testified to by the informant: "Yes, it would be possible" was made in English and admitted without foundation.

From the record it is clear Mr. Hutton concluded that the defendant had agreed *it would be possible* to purchase more cocaine based on Mr. Hutton's observations and the discussion between himself, Sandra Flores, and the defendant. See RP 456-458. There was no error.

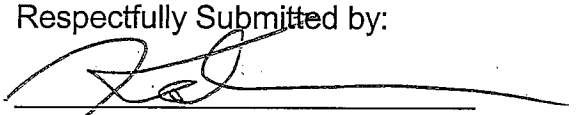
Finally, the error attributed to Detective Brown's opinion, that drug dealers frequently do not keep their drug supply in their house, was made *after* the officer's experience and qualifications as a Task Force Detective were made part of the record. Furthermore, there was substantial evidence that the defendant did keep his drugs in a location away from his residence. This was clearly established by the testimony of the informant, the statements of Sandra Flores, and the surveillance conducted by the Task Force detective. Accordingly, even if there were any foundational error, it was harmless.

4. CONCLUSION

The Court of Appeals should grant the State's motion on the merits and affirm the decision of the trial court..

Dated this 10th day of February, 2004

Respectfully Submitted by:



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